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In the Supreme Court of the United States

OCTOBER TERM, 1960

No._____

ALLIED VAN LINES, INC., a corporation,

Petitioner,

vs.

J. F. VANDENBERGH and
JEAN VANDENBERGH,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 24 of this Court respondents herein present their brief in opposition to the petition for writ of certiorari filed with this Court by the petitioner, Allied Van Lines, Inc., a corporation.

PETITIONER'S STATEMENT

The respondents herein take issue with many of the assertations contained in petitioner's statement. For instance, petitioner's statement at page 4 of the petition for

certiorari to the effect that a declaration of value was made by respondents herein with reference to the shipment of household goods and the statement at page 7 of petitioner's petition for certiorari to the effect that the applicable tariffs were published by the petitioner at the time of the shipment, citing the Court to R. 128-130. We feel, however, that no useful purpose would be served by any extended discussion of petitioner's statement in view of the fact that the erroneous assertions therein will be corrected in our argument and reasons for refusing the writ.

PETITION SHOULD BE DENIED

In this case the plaintiffs, respondents here, proved to the satisfaction of the jury that the plaintiffs never declared nor were requested to declare the value of the shipment from Forest Hills, Long Island to Helena, Montana and that, further, the respondents never signed nor were requested to sign a bill of lading prior to the loss *and, in fact, never even saw such a bill of lading until after the loss had occured.*

The petitioner relies upon plaintiffs' Exhibit No. 3 together with defendant's Exhibit No. 10 as establishing a declaration of value by the respondents in this case. Petitioner argues that respondents had an opportunity to declare value, referring to defendant's Exhibit No. 10 (R. 34) and that they did declare a value as to the entire shipment at $5,000.00, referring to plaintiffs' Exhibit No. 3 (R. 20)

Considering these two documents we find that by defendant's Exhibit 10 respondents were informed Comprehensive Transit Protection is at the rate of $5.00 for declared $1,000.00 valuation. In plaintiffs' Exhibit No. 3 defendant's agent is requested to "Please insure my things with your Comprehensive Transit Protection for $5,000.00."

It is incomprehensible to the authors of this brief how anyone could argue that an offer for insurance constitutes an opportunity given to the respondents to select a rate based upon the valuation which they place upon their shipment nor any notice that the petitioner intended to limit its liability as it sought to do in this action nor do we understand how it could be argued that a request for insurance constitutes a declaration by the respondents of the entire value of the shipment.

The word "comprehensive" is defined by Webster as "including much; inclusive" and as synonyms Webster gives the words "extensive, wide, large, full, compendious".

By Exhibit 10 respondents were informed that they would receive "full" transit protection to the extent of $5,000.00 upon the payment of $5.00 per $1,000.00. Now, after the loss petitioner attempts to limit its liability in an entirely different fashion.

It is our belief that this letter, defendant's Exhibit 10, is, in fact, in itself a violation of the rules and regulations of the Interstate Commerce Commission introduced by the

defendant (see Exhibit 13, R. 54, 125, 153) wherein it is provided:

> "(b) Each such common carrier which sells, offers or procures cargo insurance to or for a shipper of household goods shall deliver to the shipper at or prior to the time of shipment a policy or certificate of insurance which shall show clearly the name and address of the insurance company, the amount of insurance, the premium therefor, and the risks insured against, or the risks excluded, whichever is more appropriate.
>
> (c) Such common carriers or any employee, agent or representative thereof, *shall not advertise or represent to the public that insurance is provided against all risks, unless such insurance in fact affords, protection to the shipper from every peril to which the shipment may be exposed.* When all except certain risks are insured against, this fact shall be indicated in any advertisement of and in any representations to shippers regarding the insurance, *and, such advertising and representations shall not be such as to deceive or mislead the public or any shipper* regarding the scope of the exceptions. Policies providing coverage against specific perils only shall be advertised, represented, and designated as 'limited-risk policies,' or by some other appropriate designation which will indicate clearly to the shipper that not all risks are covered thereby.
>
> (d) Such carriers or any employee, agent or representatives thereof, shall not advertise or represent to the public that 'all loads are insured' or other similar wording, unless such carrier has filed tariffs with this Commission assuming complete liability, and has filed evidence of insurance with this Commission providing

protection covering all shipments to their full value without limitation and insuring against every peril to which any shipment may be exposed." (Emphasis supplied)

This item is pointed out simply as further showing the complete and total failure of the petitioner and its admitted agent, Muller Bros., Inc. to comply with the requirements of the Carmack Amendment, 49 U.S.C.A. 20 (11), set forth at Appendix A-18 of the petitioner's petition for certiorari and with the various rules and regulations of the Interstate Commerce Commission, thus failing to bring themselves within the limitation of liability there provided for.

At any rate, the question as to whether respondents did or did not declare a value for the shipment was submitted to the jury by court's instruction No. 4 reading as follows, to-wit:

"You are instructed that if you believe from a preponderance of the evidence that plaintiffs prior to or at the time of shipment placed a valuation on the property shipped, which valuation was accepted by the defendant as its fair valuation, plaintiffs are bound by the valuation so fixed, and the damages recoverable by them for the loss of the property, if any, in transit, shall be based on the formula set forth in these instructions." (R. 178)

The petitioner did not object to this instruction. Having failed to object, the instruction, under Montana law, became the law of the case. Metcalf vs. Barnard-Curtis Co., 120 Mont. 50, 180 Pac. (2d) 263; Wood vs. Jaeger, 138

Mont. 235, 270 Pac. 2d 25 and the jury in this cause obviously found under that instruction that the respondents made no such declaration of value as was necessary to limit the liability of the petitioner as petitioner seeks to do.

At page 10 of the petition for certiorari we find the statement that the evil of the opinion of the Supreme Court of Montana is in its "dogmatic assertations" as follows:

> ". . . Here there was 'no value declared in writing by the shipper or agreed upon in writing'. (346 U.S. 128, 73 S. Ct. 990) The statement in Mrs. Vandenbergh's letter regarding the comprehensive transit protection did not amount to a declaration of value . . ." (Appendix A-12 to A-13)

Considering this statement together with the lower court's instruction No. 4, quoted supra, it appears clear that the petitioner seeks to have this Court review a fact question. It is not our understanding that this function can be served on certiorari in this Honorable Court.

That the respondents herein never saw, signed nor agreed to any bill of lading or limitation of liability therein contained pursuant to any tariff of the petitioner is conclusively established by a consideration of the testimony (R. 21, 34, 66-67) together with the defendant's Exhibits 16 and 9 and the plaintiffs' Exhibit 4. Furthermore, this fact is conceded by the petitioner in its statement. See page 4 of the petition for rehearing.

We might also point out that there is no evidence whatsoever in this entire record demonstrating that the

petitioners admitted agent, Muller Bros., with whom the shipment initiated conducted their business in the manner admitted at the trial by counsel for petitioner to be required by law. See R. 128 as follows:

> "MR. HARRIS: Your Honor, we are offering this under the requirement of law that common carriers keep open for public inspection their tariffs."

The statement by counsel at that point was with reference to testimony concerning the practice of Mr. Horne, petitioner's agent, in Helena, Montana, and is no proof that petitioner's agent Muller Bros., so conducted their business. Mr. Horne further admitted on cross-examination that he personally had no knowledge as to how Muller Bros. conducted their business. (R. 134) Thus is demonstrated the erroneous nature of the assertion in petitioner's statement at page 7 that the applicable tariffs were published by the petitioner at the time of the shipment.

Viewed in the light of the evidence the authorities relied upon by the Supreme Cour of Montana fully support the position taken by that court. Consider, for instance, *Catten vs. Salt City Movers & Storage Co., Inc. 149 Fed. 2d 428.* In that case the plaintiffs had arranged with the defendant to ship their household goods and some of their personal effects from New York to Rhode Island. The van caught fire en route and the shipment was totally destroyed. The defendant in that case undertook to transport the plaintiff's property following receipt of a letter from the plain-

tiff containing a list of the goods and a request for the approximate cost of the service. In that case, as here, there was no declaration of value by the shippers nor request for such declaration and no bill of lading or receipt issued or delivered to the shippers. In that case the court said:

> "There is no dispute about certain essential facts which in addition to those already stated are, we think, decisive on the question of the defendant's liability for full damages. It was a common carrier by motor vehicle which was expressly authorized or required by the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, and it had established and did maintain such rates at the time it accepted the plaintiff's property for transportation. Moreover, we shall assume for the purposes for this appeal that the defendant's tariffs and schedules were duly filed with the Interstate Commerce Commission and that they showed that the rate quoted to and paid by the plaintiffs was an alternative one and was based upon a valuation to which the carrier's liability was to be limited. For the purpose of showing the facts that we have just assumed, the defendant's schedules were offered in evidence but they were excluded. If this exclusion was erroneous, see American Railway Express Co. v. Daniel, 269 U.S. 40, 56 S. Ct. 15, 70 L. Ed. 154, the error was harmless in view of our conclusion that the manner of the shippers' valuation did not fulfill the statutory condition precedent to the formation of a valid contract for limitation of the carrier's liability." * * *

"The statute makes it abundantly clear that the carrier's common law liability for full actual damages, whether or not caused by its negligence, is imposed when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain specified action by the shipper in respect to a voluntary valuation of his goods. Even then the carrier is not permitted to contract against liability for its own negligence. Only by giving the shipper an opportunity to choose between higher and lower rates based upon valuation can the carrier place the shipper who has selected a lower rate in the prescribed manner in the position where he is estopped to assert loss or damage to an amount in excess of the declared valuation upon which the rate was fixed. Boston & Maine R. Co. v. Piper, 246 U.S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469; Hart v. Pennsylvania R. Co., 112 U.S. 331, 5 S. Ct. 151, 28 L. Ed. 717; Union Pacific R. Co. v. Burke, 255 U.S. 317, 41 S. Ct. 282, 65 L. Ed. 656. Here nothing was done by the shippers which amounted to written action by them as to valuation, and any agreement limiting the defendant's liability to less than the actual value was void. Therefore it was correct for the district court to instruct the jury that the defendant was liable for the full value of the plaintiff's goods."

If the foregoing case is not controlling in this instance then the requirement of the Carmack Amendment that there be a bill of lading issued and the condition of the proviso that there be a value declared in writing by the shipper or agreed upon in writing as the released value of the property (See Petition A-18, A-19) becomes meaningless.

For a statement of the same rule that to bring itself within the exception of the proviso limiting liability the carrier must establish a declaration in writing by the shipper of the value of the property or an agreement in writing of released value see also *Stricker vs. Chicago M. W. Ry. Co. System, 241 Iowa 649, 40 N. W. 2d 30; Rabb vs. Ry. Express Agency, __ __ (Ohio) ___, 95 N.E. 2d 784; Clubb vs. Hetzel, 165 Kan. 549, 198 Pac. 2d 142,* and cases therein cited.

Examining the cases cited by petitioner in support of its petition we find that none of them in fact support petitioner's position. For instance, the first case cited, *American Ry. Express Co. vs Lindenburg. 260 U.S. 584, 43 Sup. Ct. 206, 67 L. Ed. 414,* contains the following statement by this Court:

> " 'It is sufficient *if the shipper accepts the carrier's bill of lading* without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading.'
>
> "The respondent *by receiving and acting upon the receipt,* although signed only by the petitioner, assented to its terms, and the same thereby became the written agreement of the parties. McMillan v. Michigan S. & N.I.R. Co. 16 Mich. 79, 93 Am. Dec. 208; The Henry B. Hyde, 82 Fed 681. In the absence of statutory requirement, signing by the respondent was not essential. Missouri, K. & T.R. Co. v. McCann, 174 U.S. 580, 590, 43 L. Ed. 1093, 1098, 19 Sup. Ct. Rep.

755; Inman & Co. v. Seaboard Air Line R. Co. 159 Fed. 960, 966." (Emphasis supplied).

In that case, unlike here, a copy of the bill of lading had been given the shipper prior to the shipment and the loss.

In *Adams Express Co. vs. Croninger, 226 U.S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314,* we find the following statement by this Court:

> "It has therefore become an established rule of the common law, as declared by this court in many cases, that such a carrier may, *by a fair, open, just, and reasonable agreement,* limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates or charges proportioned to the amount of risk. (citing cases.)" (Emphasis supplied)

In *Great Northern Ry. Co. vs. O'Connor, 232 U.S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703,* the shipper's admitted agent had, in fact, signed a bill of lading containing an agreed or released value, as had the shipper in *Glickfield vs. Howard Van Lines, 213 Fed. 2d 723.* The only question involved in that case concerned a minor deviation in the bill of lading from the uniform household goods bill of lading and freight bill.

In *White vs. Southern Ry. Co., 38 S.E. (2d) 111, 28 S.C. 319, 165 A.L.R. 988,* the shipper's admitted agent had in effect signed a blank check by signing the bills of lading prior to the shipment. The court in that case said:

"In the cases here, unfortunately for plaintiff, his agent, the shippers, one of whom was a practicing attorney, 'signed blank checks,' so to speak, when they signed the bills of lading before they were completed in every detail, and in the absence of fraud, false billing, or an attempt at rebating, prepayment by the shippers (after the completion of the bills of lading) of the freight (carrying) charges, calculated upon any lawful rate inserted in the bills before such payment, without objection on the part of the shipper, and not in violation of any instruction given by him, is binding upon all parties, shipper, consignee, and carrier. It is elementary that, if the contracting party is in position to learn the contents of a written contract and thereby protect himself by reading it or having it read, one who is unable to read is bound to have the instrument read to him before signing it, just as one who can read is bound to read it before signing. So, also, if one sign a contract before it is completely filled out he is bound thereby, in the absence of fraud. As said by the late Mr. Justice Watts, afterwards beloved Chief Justice, in Colt Co. v. Kinard, 126 SC 205, 119 SE 581, 582, 'The courts enforce contracts, but parties make them.'" (165 A.L.R. pp. 1003-1004)

In *Jacobsen vs. Pennsylvania R. Co. (District of Columbia) 54 Atl. 2d 575*, there was a bill of lading signed by the shipper's agent and in *Holmes v. National Van Lines (Wash.), 350 Pac. (2d) 864*. we find the following statement by the court:

"Three questions are presented; all of which must be answered in the affirmative before the carrier is entitled to limit its liability:

A. Was the proposed limitation of a liability by the carrier (to thirty cents a pound), brought to the attention of the shipper?

B. Was he given a choice to contract with, or without, the limitation of liability?

C. Was the limitation of liability agreed to in writing?

The shipper relies, for a negative answer to these questions, on the fact that he never had any dealings with the carrier, other than pointing out to its representative (at his former home on Cocoa Beach, Florida) just what was to be shipped. He left with his family before the packing was completed, and without any knowledge of the rates of limitation of liability. He did not see the bill of lading until it was produced in court on the morning of the trial, and had never agreed to its terms. There was, so far as he was concerned: (a) no knowledge, (b) no choice, (c) no agreement in writing.

As the trial court pointed out, as between the shipper, personally, and the carrier, there was no limitation of liability established; but the shipper's agent who handled the transaction had: (a) knowledge; (b) a choice; and (c) admitted an agreement in writing." Here the evidence is undisputed and undenied that the respondents had not seen a bill of lading and much less did they accept such a bill of lading or act upon it. None of the conditions requisite to a proper limitation of liability on the part of the petitioner carrier here exists and the instructions of which the petitioner complains were, in fact, more favorable than petitioner had any right to

expect. As, for instance, court's Instruction No. 5, given as Instruction No. 7 (R. 184) allowing the jury to determine whether on not the respondents had in fact agreed or assented to the terms of the bill of lading when under the evidence no finding other than that they did not could possibly be made.

With reference to the petitioner's tariff 48C upon which the limitation of liability set forth on the reverse side of their bill of lading is based, we might point out that it was not proven by the petitioner that this tariff was ever filed with the Interstate Commerce Commission and published as required by law excepting insofar as Rule 12 thereof is concerned. We will now consider the effect of Rule 12 in this case.

It is conseded that the respondents had never seen the bill of lading prior to the loss, that they were not even informed when the property was to be shipped and were, therefore, never given an opportunity to set forth on the bill of lading the items of particular value concerning which petitioner sought to avoid liability based upon its Rule 12. (See p. 7 of Petition) Petitioner admitted by its pleading that Muller Bros. of Forest Hills, Long Island, New York, who initiated the shipment was its agent. (R. 2-7) The evidence was undisputed and undenied that Muller Bros. were fully aware of the existence in the shipment of items of unusual value. (R. 29-30) Muller Bros. as agents of the petitioner and not as agents of the respondents prepared the bill of lading and initiated the

shipment. Their knowledge as to the existence in the shipment of the silverware, stamps, etc. must be, under general principles of agency, attributed to the petitioner. Their dereliction of duty in failing to list on the bill of lading these items must likewise be attributed to the petitioner. Obviously the only purpose in setting forth these items on the face of the bill of lading is to give notice to the carrier that they are included. The carrier in this cause being possessed of that knowledge through its agents and having by its own action, through its agent, failed to set them forth on the bill of lading as obviously found by the jury, under the court's instruction No. 3 (R. 176-177), cannot now, based upon the acts of its own agent, preclude a recovery by the respondents for those items.

CONCLUSION

There is no proof whatsoever in the record of this case that the shipper here understated the value of the property shipped for the purpose of reducing the rate. The Federal statutes upon which the petitioner relies set forth the manner in which the petitioner may limit its liability. The proof established that the petitioner did not follow those statutes. The petitioner here in effect asks this Court to review and reverse a finding of fact which was fully supported by the evidence and testimony introduced in the District Court in Montana and petitioner has not demonstrated that the Montana court determined this case in a way not in accord with the applicable decisions of

this Honorable Court. In fact, it appears that the Montana court's decision is fully in accord with the statements of this Honorable Court.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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